No. 14-915

IN THE

# Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,
*Petitioners*,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF RESPONDENTS CALIFORNIA TEACHERS ASSOCIATION, ET AL. IN OPPOSITION


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## RULE 29.6 STATEMENT

None of the Respondents is a nongovernmental corporate party that has a parent corporation or has stock that is held by any publicly held company.

## TABLE OF CONTENTS


| | Page |
|---|---|
| RULE 29.6 STATEMENT | i |
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF THE CASE | 1 |
| A. Statement of Facts | 1 |
| B. Proceedings Below | 6 |
| REASONS FOR DENYING THE WRIT | 8 |
| I. *ABOOD'S* HOLDING RESTS ON SOLID CONSTITUTIONAL FOOTING AND HAS BEEN REPEATEDLY REAFFIRMED. NEITHER *KNOX* NOR *HARRIS* PUTS THAT HOLDING INTO QUESTION | 8 |
| II. PETITIONERS' THEORIES FOR OVERRULING *ABOOD* LACK SUBSTANCE | 17 |
| III. THE RECORD IS INADEQUATE TO PERMIT CONSIDERATION OF PETITIONERS' ATTACK ON *ABOOD* | 22 |
| IV. PETITIONERS' ARGUMENTS AGAINST THE UNIONS' OPT-OUT OBJECTION PROCEDURE ARE PREMISED ON FACTS AND ISSUES NOT PRESENTED ON THIS RECORD. | 27 |
| CONCLUSION | 32 |

## TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) | *passim* |
| *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) | 25 |
| *Bd. of Educ. v. Round Valley Teachers Ass'n*, 13 Cal. 4th 269 (1996) | 2 |
| *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) | 13 |
| *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) | 10, 11 |
| *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167 (1967) | 9, 10, 18 |
| *City of San Jose v. Operating Eng'rs Local 3*, 49 Cal. 4th 597 (2010) | 3 |
| *Detroit Fed'n of Teachers, Local 231 v. Bd. of Educ. of the Sch. Dist. of the City of Detroit*, 240 N.W.2d 225 (Mich. 1976) | 19 |
| *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) | 11 |
| *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542 (9th Cir. 1989) | 25 |
| *Harris v. Quinn*, 134 S. Ct. 2618 (2014) | *passim* |
| *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) | 24 |
| *Keller v. State Bar of California*, 496 U.S. 1 (1990) | 13 |
| *Knight v. Minnesota Community Colleges Faculty Association*, 460 U.S. 1048 (1983) | 10, 11 |
| *Knox v. Service Employees International Union*, 132 S. Ct. 2277 (2012) | 14 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Land v. Dollar*, 330 U.S. 731 (1947) | 30 |
| *Lane v. Franks*, 134 S. Ct. 2369 (2014) | 21 |
| *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991) | *passim* |
| *Locke v. Karass*, 555 U.S. 207 (2009) | 11 |
| *Machinists v. Street*, 367 U.S. 740 (1961) | 9 |
| *Minn. State Bd. v. Knight*, 465 U.S. 271 (1984) | 10, 11 |
| *NASA v. Nelson*, 562 U.S. 134, 131 S. Ct. 746 (2011) | 16 |
| *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 721 F.2d 1402 (D.C. Cir. 1983) | 17 |
| *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) | 29 |
| *Pickering v. Board of Education*, 391 U.S. 563 (1988) | 16 |
| *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1 (1979) | 3 |
| *San Mateo City Sch. Dist. v. Pub. Emp't Relations Bd.*, 33 Cal. 3d 850 (1983) | 2 |
| *Seidemann v. Bowen*, 499 F.3d 119 (2d Cir. 2007) | 31 |
| *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508 (5th Cir. 1998) | 31 |
| *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) | 13, 20 |
| *United Teachers of L. A. v. L. A. Unified Sch. Dist.*, 54 Cal. 4th 504 (2012) | 2 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Vergara v. California*, No. BC 484642 (Cal. Super. Ct. Aug. 27, 2014), available at http://goo.gl/ThBjNQ | 23 |
| **STATUTES AND REGULATIONS** | |
| Cal. Educ. Code §§ 2200 *et seq.* | 2 |
| Cal. Educ. Code § 44929.21 | 2 |
| Cal. Educ. Code §§ 44932 *et seq.* | 2 |
| Cal. Gov't Code §§ 3543-3543.5(c) | 2 |
| Cal. Gov't Code § 3543.2(a) | 2 |
| Cal. Gov't Code § 3544 | 2 |
| Cal. Gov't Code § 3544.9 | 2 |
| Cal. Gov't Code § 3546(a) | 2, 3 |
| Cal. Gov't Code § 3547.5 | 18 |
| Regs. of Cal. PERB, 8 C.C.R. § 32992(a) | 4 |

## STATEMENT OF THE CASE

Petitioners' request that this Court take this case to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and "invalidate[ ] ... public-sector 'agency shop' arrangements," Pet. i, rests on distortions of this Court's agency shop jurisprudence from *Abood* through *Harris v. Quinn*, 134 S. Ct. 2618 (2014), coupled with Petitioners' own legal theories that find no support in the Court's First Amendment decisions, and on Petitioners' assertions of "facts" regarding the challenged agency shop arrangement that lack support in the record.

Petitioners' additional request that the Court take this case to declare that agency fee "opt-out" procedures violate the First Amendment is equally defective in its lack of substance and its lack of footing in the record. Moreover, the circuit split Petitioners invoke does not concern the opt-out question presented by this case but rather a completely different question.

The petition for certiorari should be denied.

### A. Statement of Facts

1. A public employer, like a private employer, must determine the wages, hours of work and other terms and conditions of employment it will provide to the individuals it hires as employees. California, like many States, has provided that if a majority of the employees in an appropriate bargaining unit choose to be represented by a union for purposes of collective bargaining, the employer will not determine those matters unilaterally but will recognize the union as exclusive bargaining representative for all employees in the unit and will seek in good faith to reach agreement

with the exclusive representative.[1] Cal. Gov't Code §§ 3543-3543.5(c), 3544. The California statute provides both that an employee is free not to become a member of the union, *id.* § 3546(a), and that "[t]he employee organization recognized or certified as the exclusive representative ... shall fairly represent each and every employee in the appropriate unit," *id.* § 3544.9.

Pursuant to that statutory scheme, Respondents California Teachers Association ("CTA"), National Education Association ("NEA") and their local unions (collectively "Respondents" or "the Unions") are the exclusive bargaining representatives of units of public school teachers and other educational employees throughout California. The Unions negotiate collective bargaining agreements with school district employers under which obligations are assumed by the Unions as well as by the school districts. For exam-

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[1] Collective bargaining by school districts is "limited to matters relating to wages, hours of employment, and other terms and conditions of employment." Cal. Gov't Code § 3543.2(a). The latter phrase excludes various matters that are legislatively determined. For example, health and welfare benefits are subject to bargaining, but pension benefits are not. *Id.* The latter are set by the Education Code, *see* Cal. Educ. Code §§ 2200 *et seq.*, and California law does not allow bargaining that would replace terms set by that extensive statutory scheme. *See United Teachers of L. A. v. L. A. Unified Sch. Dist.*, 54 Cal. 4th 504, 513-17 (2012). Tenure ("permanent status") also is addressed in the Education Code (§ 44929.21), as are termination procedures (§§ 44932 *et seq.*), so those subjects likewise are not subject to bargaining. *See, e.g., Bd. of Educ. v. Round Valley Teachers Ass'n*, 13 Cal. 4th 269, 285-86 (1996); *San Mateo City Sch. Dist. v. Pub. Emp't Relations Bd.*, 33 Cal. 3d 850, 866 (1983).

ple, the contracts often eliminate or restrict the right to strike the Unions otherwise might exercise,[2] and establish a mutual obligation to resolve disputes through a grievance arbitration process. Pet. App. 150a-151a.

Petitioners emphasize that their suit does not challenge this exclusive representation system in any respect; if Petitioners were to prevail on their claims, "[t]he unions will remain the exclusive collective bargaining agents in each school district as long as they retain the support of a majority of teachers in those districts." Pet App. 46a.

2. Like numerous States, California has made the legislative judgment to permit a public sector union acting as an exclusive bargaining representative to charge employees who do not choose to become members of the union an agency fee, not to exceed the dues payable by members. That permission is subject to the limitation that "[a]gency fee payers shall have the right, pursuant to regulations adopted by the Public Employment Relations Board, to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative." Cal. Gov't Code § 3546(a).

The Public Employment Relations Board's regulations require the exclusive bargaining representative

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[2] *See San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 13 (1979); *City of San Jose v. Operating Eng'rs Local 3*, 49 Cal. 4th 597, 606 (2010).

to "provide an annual written notice to each nonmember who will be required to pay an agency fee," containing a "calculation of the [union's] chargeable and nonchargeable expenditures ... based on an audited financial report." Regs. of Cal. PERB, 8 C.C.R. § 32992(a), Pet. App. 36a. The notice sent by the Unions (the "*Hudson* notice") includes a one-page form (reproduced at Pet. App. 157a-158a), entitling a nonmember to pay the reduced fee by simply placing a checkmark next to a statement that reads "I request a rebate of the nonchargeable portion of my fees," and sending the form to CTA. Pet. App. 116a. The nonmember objector need not state any reason for his or her objection to paying the full agency fee.

The fee charged by the Unions to objectors excludes, among other things, all lobbying expenses not specifically related to ratification or implementation of a collective bargaining agreement. Pet. App. 127a. And, for administrative reasons and to avoid unnecessary disputes, the Unions provide objecting nonmembers a reduction greater than the nonchargeable portion of the agency fee. Pet. App. 147a-148a.[3]

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[3] For the 2012-13 fee year, NEA determined that 45.89% of its expenditures was chargeable, but the fee paid by objectors was set at only 40.0%; for CTA, 68.4% was chargeable but objectors paid 65.4%; for the local unions, the chargeable percentages ranged from 84.36% to 100% but objectors paid only 65.4%. *Id.*

Petitioners' contention that nonmembers who wish to contest the Unions' chargeability determinations must embark on difficult and expensive litigation, Pet. 33, is refuted by the record. If an objector wishes to challenge the Unions' determination of the chargeable percentage of the fee, he or she need

3. For many years, the ten individual Petitioners have been teachers in California public schools at which the Unions are exclusive bargaining representatives, and have chosen not to become union members. Pet. App. 46a-49a. Petitioners do not allege that they are opposed to union representation as such, and do not deny that that there are many activities of the Unions as exclusive bargaining representatives from which they benefit. Rather, each Petitioner alleges in identical conclusory boilerplate that, "[b]ut for California's 'agency shop' arrangement, [he or she] would not pay fees to or otherwise subsidize the teachers' union, and [he or she] ... objects to many of the unions' public policy positions, including positions taken in collective bargaining." Pet. App. 46a-51a. The complaint does not identify, even in general terms, the "public policy positions" the Unions pursue in collective bargaining which Petitioners oppose.[4]

In every year that they have been nonmembers, the Petitioners have checked the box to opt out of paying the full agency fee and by doing so and returning the form have paid only the reduced fee described above. Pet. App. 46a-51a. None of the Petitioners has ever re-

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only check another box on the *Hudson* notice objection form. Pet. App. 116a, 157a. This triggers a proceeding before an impartial decisionmaker in which the Unions bear the entire cost of the proceeding; objecting feepayers are not required to adduce evidence, to lodge particular objections or even to be present; and the Unions have the burden to establish chargeability. Pet. App. 116a.

[4] This is not a class action. The individual Petitioners are joined by the Christian Educators Association International, but the allegations concerning CEAI and its members (which the Unions have denied, Pet. App.122a) add nothing of substance. *See* Pet. App. 51a.

quested that an objection continue in effect for more than a year. Pet. App. 154a.

The Unions have alleged on information and belief, without contradiction, that no nonmember has been deterred from opting out, or has failed to opt out due to any lack of awareness of the procedure for doing so. Pet. App. 152a. As the Unions have explained, a teacher's choice not to become a member does not imply that the teacher disagrees with the Unions' nonchargeable activities; individuals choose not to become members for a number of different reasons, ranging from a desire not to be subject to internal union disciplinary rules to a concern that an employer might disfavor employees who have chosen to be union members. *See* Pet. App. 152a-153a. And the Unions have alleged on information and belief that the great bulk of their nonchargeable activities are viewed as beneficial by nonmembers as well as members. Pet. App. 153a. So, "when a nonmember does not opt out of paying the full agency fee, the most likely reason is that the nonmember is not opposed to the Unions' nonchargeable activities." *Id.*

### B. Proceedings Below

Petitioners brought this action in April 2013. Two months later they moved for a preliminary injunction, acknowledging that controlling precedent required denial of their motion, but submitting numerous declarations and other exhibits, which Respondents maintained were inaccurate in fundamental respects. *See* Union Defendants' Application for an *Ex Parte Order* (Dist. Ct. Dkt. 78) at 3-6.

Respondents urged that the record be developed so

as to be "adequate for the review [Petitioners] intend[ed] to seek in the appellate courts." *Id.* at 6. Petitioners responded by filing a motion for judgment on the pleadings in order to avoid discovery or evidentiary proceedings. *See* Plaintiffs' Motion for Judgment on the Pleadings (Dist. Ct. Dkt. 80) at 3. Respondents reiterated that they "would prefer to ground the judgment on a factual record," Opposition to Plaintiffs' Motion for Judgment on the Pleadings (Dist. Ct. Dkt. 90) at 4, but the parties stipulated that "the Union Defendants ... will not oppose Plaintiffs' request that the Court enter ... judgment in favor of Defendants, provided that the Union Defendants first are permitted to amend their answer ..., so that the judgment will be entered on pleadings that more fully state the Union Defendants' response to Plaintiffs' claims." Stipulation Regarding Pending Motions and Amendment of Answer (Dist. Ct. Dkt. 87) at 1. Respondents thereupon filed an Amended Answer which, as Petitioners state, "provided [the Unions'] comprehensive view of the facts." Pet. 37 (citing Pet. App. 113a-156a).

The District Court granted the motion of California's Attorney General to intervene on behalf of the State to defend the constitutionality of the statutes challenged by Petitioners, granted judgment on the pleadings in favor of the Unions and the State, and vacated the motion for preliminary injunction as moot. Pet. App. 8a.

Petitioners urged the Court of Appeals to summarily affirm the judgment. The Unions responded that Petitioners' brief urging summary affirmance contained a host of erroneous factual assertions, and they suggested that, in affirming, the Court of Appeals should make clear the factual assumptions on which its decision was based. *See* Opposition to Ap-

pellants' "Urgent Motion" (9th Cir. Dkt. 50) at 3-4. Petitioners argued against that course. *See* Appellants' Reply in Support of Urgent Motion (9th Cir. Dkt. 51) at 1-2. The Court of Appeals summarily affirmed the District Court without opinion. Pet. App. 1a-2a.

## REASONS FOR DENYING THE WRIT

### I. *ABOOD'S* HOLDING RESTS ON SOLID CONSTITUTIONAL FOOTING AND HAS BEEN REPEATEDLY REAFFIRMED. NEITHER *KNOX* NOR *HARRIS* PUTS THAT HOLDING INTO QUESTION

A. *Abood* holds that a State may permit a public-sector exclusive bargaining representative to charge nonmembers a mandatory agency fee "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 U.S. at 232. That holding, as Justice Stewart's opinion for the Court explains, rests on two basic propositions.

First, "[t]he principle of exclusive union representation," which is "a central element in the congressional structuring of industrial relations," 431 U.S. at 220, is a principle that a State may properly "cho[ose] to establish for local government units," *id.* at 223. Second, when a State makes that choice, "the designation of a union as exclusive representative carries with it great responsibilities." 431 U.S. at 221. "[A]dministering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money." *Id.* "Moreover, in carrying out these duties, the union is

obliged 'fairly and equitably to represent all employees ..., union and nonunion,' within the relevant unit." *Id.* (quoting *Machinists v. Street*, 367 U.S. 790, 761 (1961)).

It follows from the foregoing, the Court concluded, that it is consistent with the First Amendment to require all represented employees to pay a share of the union's expenses as their exclusive collective bargaining representative in order "to distribute fairly the cost of these activities among those who benefit, and [to] counteract[ ] the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees," *id.* at 222, so long as objecting nonmembers are not required to provide financial support "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative," *id.* at 235.

Concurring in the judgment, Justice Powell questioned whether "a State or municipality may agree to set public policy on an unlimited range of issues in closed negotiations with 'one category of interested individuals,'" *id.* at 261 (opinion of Powell, J.) (quoting *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1967)), expressing the view that, "[on] ... such questions as how best to educate the young," *id.* at 263 n.16, neither exclusive representation nor mandatory agency fee provisions "might be expected" to pass constitutional muster, *id.* But Justice Powell agreed that, as to matters such as "teachers' salaries and pension benefits, ... the case for requiring the teachers to speak through a single representative

would be quite strong," and "the case for requiring all teachers to contribute to the clearly identified costs of collective bargaining also would be strong, while the interest of the minority teacher, who is benefited directly, in withholding support would be comparatively weak." *Id.* Justice Powell added that "[t]he same may be said of union activities other than bargaining," such as "[t]he processing of individual grievances," which "may be an important union service for which a fee could be exacted with minimal intrusion on First Amendment interests." *Id.*[5]

Subsequently, in *Knight v. Minnesota Community Colleges Faculty Association*, 460 U.S. 1048 (1983), the Court unanimously and summarily affirmed a decision that "rejected ... [an] attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment." *Minn. State Bd. v. Knight*, 465 U.S. 271, 278 (1984) (describing *Minn. Cmty. Colls. Faculty Ass'n*). In *Minnesota State Board*, not only the opinion of the Court, *id.*, but also the dissent by Justice Stevens in which Justices Powell and Brennan joined, recognized as "settled law" that, as to "terms and conditions of employment," a public employer does not violate the Constitution by "negotiat[ing] only with the elected representative of its employees." *Id.* at 315-16 (Stevens, J., dissenting).

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[5] Justice Powell expressed concern that, "[u]nder today's decision, a nonunion employee who would vindicate his First Amendment rights apparently must initiate a proceeding to prove that the union has allocated some portion of its budget to 'ideological activities unrelated to collective bargaining.'" *Id.* at 263-64. In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court established procedural requirements that obviate that concern.

B. The *Knight* cases put beyond doubt the constitutionality of public sector exclusive representation for the purpose of collective bargaining as to terms and conditions of employment. And, after *Knight*, in each of the agency fee cases decided by this Court from *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) through *Locke v. Karass*, 555 U.S. 207 (2009), the Court was unanimous in reaffirming the "general First Amendment principle," *Locke*, 555 U.S. at 213, established in *Abood*, that all bargaining unit employees may be required to pay their share of the expenses incurred by an exclusive bargaining representative for "collective-bargaining, contract administration, and grievance-adjustment purposes." *Abood*, 431 U.S. at 232.

Thus, in *Hudson*, the Court fashioned procedures to "adequately protect[ ] the basic distinction drawn in *Abood*," *Hudson*, 475 U.S. at 302, between "collective-bargaining activities," as to which all employees may be required to pay their share of the costs, and "ideological activity," which objecting nonmembers cannot be required to support. *Id.* (quoting *Abood*, 431 U.S. at 237). And in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), where the Court was called upon to consider in greater detail the principles that determine whether objecting nonmembers may constitutionally be required to provide financial support for union activities, all Members of the Court agreed that all employees in a bargaining unit may properly be required to pay their share of the expenses of the exclusive representative's collective bargaining activities. *See id.* at 519, 522-23, 526 (opinion of the Court); *id.* at 541-41, 550 (opinion of Marshall, J.); *id.* at 550, 552-53, 556 (opinion of Scalia, J.); *id.* at 563 (opinion of Kennedy, J.). The separate opinions

in *Lehnert* differed only as to the articulation of how an expenditure must be related to collective bargaining in order to be chargeable. *Compare id.* at 519 (opinion of the Court) with *id.* at 556-58 (opinion of Scalia, J.), and *id.* at 562-64 (opinion of Kennedy, J.).

In particular, although Justice Scalia disagreed with the *Lehnert* majority's test for determining chargeability, he agreed that *Abood* had properly identified "the state interest in compelling dues," *id.* at 552 (opinion of Scalia, J.), and he explained what "justifies th[e] constitutional rule" established in *Abood*:

> Our First Amendment jurisprudence ... recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other. Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry – indeed, *requires* the union to go *out of its way* to benefit, even at the expense of its other interests.

*Id.* at 556 (emphasis in original).

In other contexts as well, the Court has recognized the authority of *Abood* and of the First Amendment principles stated in that case. In *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001), the Court recognized *Abood* as the leading case setting out "the First Amendment principles" for "cases involving expression by groups which include persons who object to the speech, but who nevertheless must remain members of the group by law or necessity." The Court stated that such cases are to be decided by "proper application of the rule in *Abood*," explaining:

> In *Abood*, the infringement upon First Amendment association rights worked by a union shop arrangement was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations...." To attain the desired benefit from collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association.

*Id.* at 413-14 (quoting *Abood*, 431 U.S. at 222).

So too, as the Court stated in *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 231 (2000), "[t]he principles outlined in *Abood* provided the foundation for the Court's decision in *Keller* [*v. State Bar of California*, 496 U.S. 1 (1990)]," upholding mandatory bar dues. *Cf.* Brief of Goldwater Institute as Amicus Curiae (suggesting that overruling *Abood* would lead to overruling *Keller*).

C. Petitioners' principal argument – that the decisions in *Knox v. Service Employees International Union*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), have so sapped *Abood's* precedential authority as to call for its overruling – rests on an overreading of those decisions that ignores both what the Court said and what the Court pointedly did *not* say.

1. Petitioners place great weight on the Court's statement in *Knox* that "free-rider arguments" are "generally insufficient to overcome First Amendment objections," Pet. 21 (quoting 132 S. Ct. at 2289), so that, as *Knox* put it, "[i]f a parent-teacher association raises money for the school library, assessments are not levied on all parents," 132 S. Ct. at 2289. But to state that "general[]" rule is not to answer the question whether "what is distinctive ... about the 'free riders' who are nonunion members of the union's own bargaining unit," *Lehnert*, 500 U.S. at 556 (opinion of Scalia, J.), makes mandatory agency fee provisions constitutionally permissible in their unique context. On that question, the salient point for present purposes is the acknowledgment by the Court in *Knox* that, so far as "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues presents something of an anomaly ... [, it is] one that [the Court has] found to be justified." *Knox*, 132 S. Ct. at 2290.

2. In *Harris*, the Seventh Circuit had upheld on the strength of *Abood* the constitutionality of an Illinois statute permitting a union to charge mandatory agency fees to nonunion personal assistants who provided in-home care to disabled individuals under a state Medicaid-waiver program. In this Court, the *Harris* petitioners' lead argument was that "*Abood* Should Be

Overruled Because It Failed to Give Adequate Recognition to First Amendment Rights." Brief for Petitioners in *Harris v. Quinn*, No. 11-681, at 18. The Court did not adopt that position, deciding the case on the ground that it was error for the Seventh Circuit to "approve a very substantial expansion of *Abood's* reach," 134 S. Ct. at 2634, to individuals as to whom "the State's authority [wa]s vastly different" from its authority with respect to "full-fledged public employees," *id.* at 2634, 2635, and as to whom the union's representational role was "sharply limited," *id.* at 2635. As the Court put it, to sustain the mandatory fee in *Harris* would not be "to apply [*Abood*] in a way that is consistent with its rationale." *Id.*

In explaining that conclusion, *Harris* described Justice Scalia's *Lehnert* opinion as presenting "the best argument ... in support of *Abood*." *Harris*, 134 S. Ct. at 2636, 2637 n.18. Without taking issue with that argument, *Harris* concluded that the argument "has little force *in the situation now before us*," *id.* at 2637 (emphasis added), because, under Justice Scalia's *Lehnert* analysis, "the scope of the union's bargaining authority has an important bearing" on the permissibility of mandatory agency fees, *id.* at 2637 n.18, and in *Harris* the authority of the union was so "sharply circumscribed" as to make *Abood's* "best argument" "a poor fit," *id.* at 2636.[6]

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[6] *See also id.* at 2634-37 (distinguishing *Abood* because of "[t]he union's limited authority"); *id.* at 2636 ("[t]he unusual status of personal assistants has important implications for present purposes"); *id.* at 2737 n.18 (the obligation of the union in *Harris* to represent nonmembers in grievances "bears little resemblance to the obligation imposed on the union in *Abood*"); *id.* at 2640 ("[t]he union's very restricted role under the Illinois law is also significant").

Contrary to what Petitioners repeatedly suggest, *see* Pet. 13-14, 25, 27, it was only because of the "unusual" circumstances of *Harris*, 134 S. Ct. at 2636, that the Court concluded that mandatory agency fees could not be sustained in that case under the balancing test of *Pickering v. Board of Education*, 391 U.S. 563, 573 (1988). The Court found that *Pickering* was inapplicable because "the State [was] not acting in a traditional employer role," 134 S. Ct. at 2642, and was not entitled to the deference accorded to the government "acting as 'a proprietor in managing its internal operations,'" *id.* n.27 (quoting *NASA v. Nelson*, 562 U.S. 134, 131 S. Ct. 746, 751, 758-59 (2011)). And, having determined that the interest in avoiding free riding that justified mandatory agency fees in *Abood* and *Lehnert* did not extend to the situation in *Harris* because the union's representational obligations were so attenuated, the Court concluded that the anti-free-riding interest could not sustain a mandatory agency fee in those "unusual" circumstances. *Id.* at 2636-37, 2643. That holding does not put into question the *Abood* rule that mandatory agency fee provisions are constitutional as to full-fledged public employees.[7]

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[7] Petitioners misconstrue the Court's statement that "[t]he agency-fee provision cannot be sustained unless the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join." *Harris*, 134 S. Ct. at 2641, quoted in Pet. 25. That statement, coming after the Court had determined that the union did not have the kind of representational duties that justify mandatory fees, rejected the very different contention that personal assistants should be required to pay an agency fee simply because the union had "achieved" various "benefits" for them. *Id.*

## II. PETITIONERS' THEORIES FOR OVERRULING *ABOOD* LACK SUBSTANCE

A. Petitioners seek to topple *Abood's* foundation by insisting that the duty imposed on a union as exclusive bargaining representative to fairly serve members and nonmembers alike does not "distinguish[ ] the unions from other advocacy groups." Pet. 22. Petitioners' *ipse dixit* does not have one iota of support.

1. An exclusive bargaining representative has an affirmative "duty to deliver services," *Lehnert*, 550 U.S. at 556 (opinion of Scalia, J.), to nonmembers and members alike, performance of which "often entail[s] expenditure of much time and money," *id.* at 552-53 (quoting *Abood*, 431 U.S. at 221). For example, a union must handle a nonmember's grievance under a collective bargaining agreement just as it would handle a member's grievance, notwithstanding the costs involved. *See Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 721 F.2d 1402, 1406-07 (D.C. Cir. 1983) (the duty of fair representation does not permit a union to provide attorneys to handle grievances for members while providing only non-attorney representatives to handle grievances for nonmembers). *Cf. Harris*, 134 S. Ct. at 2637 (noting that, unlike the union in *Harris*, unions representing full-fledged public employees have "the duty to provide equal and effective representation for nonmembers in grievance proceedings ..., an undertaking that can be very involved"). Nor may a union favor members over nonmembers in contract negotiations. *See id.* at 2636.

No such obligations are imposed by law on organizations such as the American Medical Association, *see* Pet. 22.[8]

2. Continuing their mistaken account of how unions compare to "other advocacy group[s]," Pet. 23, Petitioners claim that "compulsory subsidization in the union context is ... *more* of a deprivation" than in the case of other groups, *id.* at 23-24 (emphasis in original), because the agency shop "precludes dissenting employees from advancing contrary views to the relevant decisionmaker." Pet. 23. If there were anything to that "preclusion" argument, it would not bear on the requirement to pay a mandatory agency fee, but on the proper extent of the public employer's obligation to deal solely with the exclusive bargaining representative in the first place.

But in any event, that obligation – upheld in *Knight* and not challenged in this case, *see supra* at 3, 10 – does *not* preclude a dissenting employee from expressing views contrary to those of the union "to the relevant decision-maker" (Pet. 23) in public meetings where a collective bargaining agreement is proposed for adoption. *See City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 178 n.10 (1976); *see also* Cal. Gov't Code § 3547.5. As for Petitioners' claim that the exclusive representation principle frustrates their desire to "individually *bargain*," Pet. 23 (emphasis added), public employers

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[8] If it is true that the AMA never lobbies for measures that benefit its members more than non-member physicians – an assertion for which Petitioners offer no support, *see* Pet. 22 – that is immaterial, as the Unions do not charge objecting nonmembers for the expenses of lobbying.

have never been held to have a duty to "individually bargain" with employees, and in the absence of collective bargaining a public employer typically unilaterally institutes whatever terms and conditions of employment it may choose, without engaging in individual bargaining. *See Detroit Fed'n of Teachers, Local 231 v. Bd. of Educ. of the Sch. Dist. of the City of Detroit*, 240 N.W.2d 225, 227 (Mich. 1976) ("Before teachers unionized ...[f]ew individual teachers had any real bargaining power and the contract terms were frequently imposed by the [School] Board rather than negotiated by the parties.").[9]

B. Petitioners argue that *Abood* and its progeny must be wrongly decided because those decisions treat as chargeable efforts to obtain better wages and terms and conditions of employment through collective bargaining even though "efforts to advance the same ... agenda through lobbying" are not chargeable. Pet. 13. According to Petitioners, "[n]either *Abood* nor subsequent cases have articulated any principled basis for [this distinction]." Pet. 16. That criticism is unwarranted not only as to *Abood*, but as to the opinions of the eight Justices who agreed in *Lehnert* that collective bargaining is chargeable but that lobbying unrelated to the ratification or implementation of a collective bargaining agreement is not. *See Lehnert*,

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[9] In declaring that "unions can and do use their exclusive bargaining status to withhold certain benefits from being provided by the *employer*" so that the union can offer them "as a perk of membership," Pet. 24 (emphasis in original), Petitioners misstate the record. "[T]he Unions ... have never adopted as a members-only benefit a benefit they believed could feasibly be obtained from the employer." Pet. App. 131a.

500 U.S. at 520-21 (plurality opinion); *id.* at 558-59 (opinion of Scalia, J.).[10]

Petitioners are simply wrong in declaring that it "does not make a First Amendment difference" whether speech is part of lobbying the legislature to enact a law or of negotiating a contract with the public employer. "[U]nlike collective-bargaining negotiations between union and management ... legislatures are public fora open to all." *Lehnert*, 500 U.S. at 521 (plurality opinion). And, unlike lobbying, collective bargaining is a process of making binding collective agreements with obligations on both sides. *See supra* at 1-3.[11] Further, a union engages in collective bargaining pursuant to statutory authority and subject to a statutory duty, whereas unions generally have no comparable authority or duty with respect to lobbying. *See Lehnert*, 500 U.S. at 558-59 (opinion of Scalia, J.). The distinction between bargaining and lobbying with

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[10] Quixotically, Petitioners endorse Justice Marshall's opinion in *Lehnert*, joined by no other Justice, which argued that lobbying and collective bargaining should be treated the same. Pet. 31-32. But Justice Marshall found lobbying and bargaining to be comparable in respects that support the chargeability of *both*. 500 U.S. at 537-42 (opinion of Marshall, J.).

[11] Contrary to Petitioners' assertion (Pet. 26), neither *Knox* nor *Harris* says that the purpose of mandatory agency fees is "speech itself." On the contrary, in explaining that compulsory subsidies are not permissible "where the principal object is speech itself," the Court in *United Foods* contrasted such a situation with one where subsidies are part of a broader program that serves legitimate non-speech purposes, pointing to *Abood* as an exemplar of the latter. *United Foods*, 533 U.S. at 413-14, 415-16.

respect to chargeability thus reflects "the scope of the union's ... authority." *Harris*, 134 S. Ct. at 2637 n.18.[12]

C. Petitioners emphasize that public sector collective bargaining may have "political elements." *See* Pet. 16-19. But, as Petitioners themselves are at pains to point out, Pet. 14, that is not a late-blooming revelation that the *Abood* Court failed to take into account. *See Abood*, 431 U.S. at 231. Abood also recognized and took into account that public sector bargaining sometimes involves matters of public concern as to which "[a]n employee may very well have ideological objections," *id.* at 222, such as with regard to a union's wage policy, *id.* An employee's desire not to fund certain speech, like employee speech itself, "is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern," but must be balanced against competing interests. *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014).

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[12] In *Harris*, the Court stated that attempting to classify union expenditures has presented "practical administrative problems" reflected in cases that have arisen "[i]n the years since *Abood*." 134 S. Ct. at 2633. Petitioners would rephrase this statement to say that "the line *Abood* drew between collective bargaining and ... lobbying ... has proven to be entirely 'unworkable.'" Pet. 31. This Court's statement in *Harris* cannot bear that weight. The "long line of subsequent decisions [of this Court]" to which Petitioners refer (Pet. 31) includes only one case decided in the twenty-four years since *Lehnert*. That was the decision in *Locke*, which did not involve the line between bargaining and lobbying and in which the Court was unanimous. In the lower courts as well, recent years have seen only a handful of chargeability disputes. A Westlaw search of federal cases that have cited *Lehnert* during the past ten years, which would include any case in which a chargeability determination was at issue, turns up only seven actions in which such an issue has been litigated.

In *Harris*, the balance came out against the challenged agency fee provision only because of factors that this Court recognized would not be present in a case involving collective bargaining on behalf of full-fledged public employees. *See supra* at 15-16.

## III. THE RECORD IS INADEQUATE TO PERMIT CONSIDERATION OF PETITIONERS' ATTACK ON *ABOOD*

A. Petitioners ask the Court to opine on the constitutionality of a "multi-hundred-million-dollar regime of compelled political speech" that forces nonmembers to "subsidize political speech with which they disagree." Pet. 1, 10. But the record does not provide a basis to assume that this case concerns such a regime. Having refused to allow the development of a factual record, *see supra* at 6-8, Petitioners now fail to ground their submission on facts that may properly be taken as true. The representations in the petition concerning the nature and effect of the agency fee system run up against contrary averments in the Unions' answer, and are refuted by the public record as well.

Thus, in support of their claim that they are being forced to fund collective bargaining positions with which they disagree, Petitioners place particular emphasis on contentions that the Unions' collective bargaining efforts have been directed at securing pension benefits and employment-retention rights such as tenure. Pet. 18. Yet those matters are expressly controlled by California statutes and therefore are matters for which the Unions *do not and cannot engage in collective bargaining*. *See supra* note 1. The *Vergara* case, presently on appeal, of which the petition makes so much, *see* Pet. 19, 23, proves that point

and makes clear how egregiously Petitioners' arguments depart from the facts. *Vergara* does not concern collective bargaining; rather, "[p]laintiffs [in *Vergara*] challenge[d] five statutes of the California Education Code, claiming said statutes violate the equal protection clause of the California Constitution." *Vergara v. California*, No. BC 484642, slip op. at 3 (Cal. Super. Ct. Aug. 27, 2014), available at http://goo.gl/ThBjNQ. There is not a single word in the *Vergara* decision about collective bargaining.[13]

The suggestion in the petition that Petitioners' First Amendment rights have been impaired by the use of

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[13] The Brief of Former California Governor Pete Wilson, [*et al.*] as Amici Curiae ("Wilson Br.") likewise misrepresents *Vergara*. That brief claims that the *Vergara* court found that "contractually-mandated steps ... 'caus[e] districts in many cases to be very reluctant to even commence' the discipline of a failing teacher," Wilson Br. 9, when in point of fact the court's finding referred only to "the dismissal process *as required by the Dismissal Statutes*." *Vergara*, slip op. at 10-11 (emphasis added); *see also id.* at 12 (referring to the process "*required by the Dismissal Statutes* for teacher dismissals") (emphasis added). So too, the *Vergara* court emphasized that the "last hired, first fired" procedure for layoffs, which the Wilson Brief erroneously claims to be the product of collective bargaining (Wilson Br. 10), is "statutorily-mandated." *Vergara*, slip op. at 13. Indeed, at every turn the Wilson Brief attributes to collective bargaining matters that are dictated by statute, even going so far as to assert that a recent survey found that "a significant proportion of teachers ... do not support many of the policies that are set forth in their collective bargaining agreements," Wilson Br. 20, when in fact the cited survey nowhere mentions collective bargaining agreements and states in its "Key Findings" that what it claims to measure is teacher support for "changes to the challenged statutes." *See* http://studentsmatter.org/wp-content/uploads/2014/03/SM_Research-Now-Poll-Results_03.05.14.pdf.

their agency fees to negotiate salary increases and other compensation improvements likewise lacks a foundation in the record. Although the petition declares that "it is difficult to imagine more politically charged issues than how much money cash-strapped local governments should devote to public employees," Pet. 10, teachers – whether union members or nonmembers – generally view increased teacher salaries as beneficial. *See* Pet. 153a.[14] Petitioners have not alleged that they oppose the salary increases the Unions have negotiated over the years, and the Unions have alleged on information and belief that Petitioners have *not* been opposed to those economic improvements. Pet. App. 148a. This case therefore does not present the question whether an employee who has benefited financially from union collective bargaining, but who claims to feel that the benefits have been too generous, has a meritorious First Amendment challenge to the requirement that he or she pay a share of the expenses of negotiating those benefits.[15]

One searches the petition in vain for anything the Unions actually seek in collective bargaining to which the Petitioners are opposed. Petitioners' conclu-

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[14] It bears noting that, as a rule, salary increases for teachers in California school districts are not achieved under threat of a strike, *see supra* at 3, but by negotiation with officials of school districts that have an interest in providing compensation sufficient to attract and retain highly qualified teachers. It also bears noting that although some members of the public may believe that teachers are overpaid, Petitioners may not base a constitutional claim on the rights and interests of others. *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013).

[15] Had it been asserted, such a challenge would lack merit for the reasons noted *infra* at 25-26.

sory allegations that they "object[ ] to many of the unions' public policy positions, including positions taken in collective bargaining," Pet. App. 47a-51a, "will not do," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and in any event the Unions have denied those allegations, Pet. App. 148a; *see also* Pet. App. 119a-122a.

Petitioners maintain, incorrectly, that this Court's decisions from *Abood* through *Locke* failed to give the question of the constitutionality of mandatory agency fees "the consideration it deserves." Pet. 2. Yet petitioners would have the Court revisit the constitutionality of agency fee requirements on a record that does not provide a basis for giving the nature and extent of the burden, if any, that such a requirement may have on the First Amendment rights of nonmembers, and the significance of the free rider problem that would exist in the absence of that requirement, the consideration each deserves.[16]

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[16] Two of the *amici* assert that the Court should decide this case by assuming the truth of Petitioners' allegations because judgment was entered against Petitioners on the pleadings. *See Amicus Curiae* Brief of the National Right to Work Legal Defense Foundation, Inc. ("NRTW Br.") at 4 & n.4; Brief for the Cato Institute as *Amicus Curiae* ("Cato Br.") at 4 n.2. Even if this Court were charged only with determining whether the judgment was properly supported by the pleadings, the normal rule is that the reviewing court must accept as true the allegations of "the non-moving party" – here the Unions and the California Attorney General. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989). But be that as it may, this Court is being asked to hold that "public-sector 'agency shop' arrangements [are] invalid[ ] under the First Amendment," Pet. i., and that question cannot be answered by taking as true whatever unproved and controverted allegations Petitioners may have chosen to propound.

B. Of the various union "policies" the petition purports to describe, one that is indeed pursued by the Unions in collective bargaining is the negotiation of improvements in teacher salaries. If this is what the petition means by the "political speech," Pet. 1, to which Petitioners believe they shoud not be required to provide financial support (*but see supra* at 23-24), then the petition is directed at collective bargaining activity as to which any "interest ... in withholding support would be comparatively weak." *Abood*, 431 U.S. at 263 n.16 (opinion of Powell, J.).

After all, the Unions are required by law to engage in collective bargaining over salaries; California has made the constitutionally permissible decision that, where a majority of the employees in an appropriate unit have selected a union as their exclusive bargaining representative, the process of setting pay levels for the workforce, which necessarily is collective in outcome, will take the form of collective *bargaining*. If in that process the Unions generally propose increases in teacher compensation rather than freezes or reductions, and if it were the case that Petitioners were opposed to the salary increases they and their fellow teachers have received (*but see supra* at 24), Petitioners nevertheless have "benefited directly" from those improvements. *Abood*, 431 U.S. at 263 n.16 (opinion of Powell, J.). As Justice Powell recognized in his *Abood* opinion, this presents the weakest possible basis for a nonmember's constitutional claim against an agency fee requirement. That is particularly true where – as the Unions could have established had Petitioners not resisted discovery – the employees who wish to avoid paying their share of the costs incurred by the Union in negotiating their improved compensation have not seen fit to return any

of that compensation to their respective employers, "cash-strapped" (Pet. 10) or otherwise.

On this record, then, what Petitioners mischaracterize as a "multi-hundred-million-dollar regime of compelled political speech" asserting "public policy positions" with which Petitioners disagree is simply a requirement that a nonmember teacher who receives the benefit of additional compensation as a result of the Unions' efforts in collective bargaining must pay a share of the Unions' costs in negotiating those improvements, rather than receiving a free ride. If Petitioners think that an agency fee requirement may compel nonmembers to provide financial support for "political speech" of some *other* kind, this record does not present such a case for the Court's consideration.

## IV. PETITIONERS' ARGUMENTS AGAINST THE UNIONS' OPT-OUT OBJECTION PROCEDURE ARE PREMISED ON FACTS AND ISSUES NOT PRESENTED ON THIS RECORD

A. In asking this Court to revisit its approval of agency fee opt-out requirements, Petitioners refer in wholly conclusory terms to the "burden" imposed by such a requirement and the "risk" it presents to First Amendment interests. Pet. 34-35. Yet, in the District Court Petitioners' argument was that opt-out requirements violate the First Amendment "whether or not [opting out] is burdensome, and whether or not any nonmembers have erroneously failed to opt out in the past." Plaintiffs' Motion for Judgment on the Pleadings (Dist. Ct. Dkt. 81) at 8.[17]

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[17] Amicus NRTW likewise disclaims any need to show that "objecting may be burdensome," NRTW Br. at 21, declaring that

As that implicit concession reflects, assuming *arguendo* that there might be a case in which the facts would support a contention that an opt-out procedure presents a burden or risk that impairs First Amendment rights, this is not it.

Here, all that a nonmember need do to opt out is to check a box on a form and return the form to CTA; the individual then will pay an agency fee that has been reduced so that it not only excludes all nonchargeable expenses but does not even require the objector to pay his or her full share of *chargeable* expenses. *See supra* at 4-5. The Unions, which are familiar with how the procedure has operated, aver in their answer that "[t]he opt out procedure has not deterred any Plaintiff from opting out; nor, on information and belief, has it so deterred any other nonmember who wishes not to contribute to the Unions' nonchargeable activities." Pet. App. 152a. And the Unions likewise aver that "no Plaintiff [has] failed to exercise the right to opt out due to a lack of awareness of the procedure by which to do so; and on information and belief, the same is true of all other nonmembers as well." Pet. App. 152a. Those averments are uncontroverted.

Given the simplicity of the opt-out procedure and the complete absence of any evidence that as a general matter nonmembers oppose the Unions' nonchargeable activities, *see supra* at 6; Pet. App. 152a-153a, the fact that some nonmembers do not opt out is only to be expected, and cannot support a conclusion that the opt-out procedure has imposed a bur-

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the issue should be analyzed as a taking of property, *id.* at 20-21. If so, that is another reason not to grant review in this case, as Petitioners have not asserted such a claim.

den on their First Amendment rights or has subjected them to a risk that their rights will be violated.[18] The Petitioners, each of whom has opted out every year, have not identified any burden they have encountered, nor do they contend that there is a risk that they may be unable for some reason to opt out in the future if they should desire to do so.[19]

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[18] The Cato Institute professes to find it strange that nonmembers do not opt out in large numbers because Cato thinks that those who do not opt out are "subsidizing" the Democratic Party and its candidates. *See* Cato Br. at 16-17. Cato has been misled by the Complaint, which mistakenly "describe[s union] activities that include ... donating funds to candidates and political parties." *Id.* at 4 (citing Pet. App. 64a-66a). The Unions do *not* make contributions to parties and candidates; such contributions are made by a political action committee with voluntary contributions. Pet. App. 134a-135a. Thus, contrary to Cato's misinformation, a feepayer who does not opt out does not subsidize contributions to parties or candidates.

Petitioners do not allege that California's allowance of an opt-out procedure reflects viewpoint discrimination, and there would be no basis for such an allegation. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), this Court held that, because a school district policy giving the exclusive bargaining representative access to the school mail system while denying such access to a rival organization was "based on the status of the ... union[ ] rather than [its] views," the policy could not be considered viewpoint discriminatory. 460 U.S. at 49 (emphasis in original). So too here. There is nothing to suggest that California allows for opt-out systems because the legislature agrees with the positions unions espouse in lobbying or other nonchargeable activities.

[19] Petitioners state that a teacher who "misses the [six-week] deadline for opting out" is "obligated to pay the full agency fee for the next year." Pet. 7. But they do not allege that they have missed the deadline (or, for that matter, that other teachers have

Attempting to come up with some basis for claiming that the opt-out procedure may deter objections, the petition asserts that teachers may fail to opt out due to "confusion about the mechanics." Pet. 34. But the complaint does not so allege, and the answer alleges the opposite. Pet. App. 152a. Petitioners attempt to fill this lacuna by fixing on CTA's *membership form*, which gives *members* an option whether to contribute to a CTA-sponsored PAC. *See* Pet. App. 83a. The petition asserts that this form "gives many teachers the mistaken impression that checking the box [to opt out of supporting the PAC] means they have opted out of subsidizing political expenditures altogether." Pet. 7.

The membership form, and the declaration with which Petitioners submitted it, are not properly before the Court;[20] but if they were, and if the membership form could be read as Petitioners suggest (which is not the case, *see* Pet. App. 83a), this would be a moot point with respect to the Petitioners and other nonmembers. By definition, nonmembers have not

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been unable to meet the deadline), and the record does not indicate how the Unions would respond if a teacher missed the deadline and offered a reason why the lateness of his or her objection should be excused.

[20] Those materials were submitted in support of Petitioners' motion for a preliminary injunction. When the Unions indicated that they wished to challenge Petitioners' evidence, Petitioners moved for judgment on the pleadings in order to avoid having to meet that challenge. *See supra* at 6-7. This Court must "put ... to one side," *Land v. Dollar*, 330 U.S. 731, 734 (1947), the evidence Petitioners submitted in support of their preliminary injunction motion, because, "[i]n passing on a motion to dismiss ... affidavits and other evidence produced on application for a preliminary injunction may not be considered," *id.* at 735 n.4.

completed the membership form and therefore have not checked any box on that form. Rather, for nonmembers, the relevant form is the one that accompanies the *Hudson* notice, which sets forth in the clearest possible language the procedure by which a nonmember may opt out of paying the nonchargeable portion of the agency fee. Petitioners do not allege that that notice and form are misleading in any way.

B. In stating that "[t]he circuits disagree about whether it is constitutional to require dissenters to express their dissent anew each year, rather than permitting them to opt out once and have it last forever," Pet. 35, Petitioners seek to expand the reach of their petition to include a question that has arisen in a number of "opt-out" cases but is not presented here. The question as to which courts have disagreed is whether, when a nonmember has "furnished ... a continuing written objection," *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998), the union must "accept [the] dissenter's notice that his objection is continuing," *Seidemann v. Bowen*, 499 F.3d 119, 125 (2d Cir. 2007). Because Petitioners never asked the Unions to treat their objections as continuing, *see supra* at 5-6, that question is not presented here.[21]

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[21] Absent some indication from the nonmember, a union has no reason to assume that a nonmember wishes an objection to last forever, any more than a union may assume that an individual who has not objected for some number of years wishes to be considered a nonobjector forever. It is not even clear that Petitioners themselves considered their objections to be permanent. Their objection is not to union representation gen-

The sum of the matter is this: Petitioners have not made a record to support a claim that the Unions' opt-out objection procedure burdens their First Amendment interests, and this case does not present the "continuing objection" issue Petitioners seek to raise. This case therefore is a distinctly inappropriate case in which to consider a constitutional challenge to a union opt-out objection procedure.

## CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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erally, but to some unspecified "public policy positions." *See supra* at 5. Union policies change over time, as do individuals' views regarding them.